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No. 91-1650

Supreme Court, U.S.
FILED
MAY 15 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

ROBERT WAYNE LEE,

Petitioner,

v.

BAPTIST MEDICAL CENTER OF OKLAHOMA, INC; DR. SCOTT CALHOON; OKLAHOMA HEALTHCARE CORPORATION; and BAPTIST MEDICAL PLAZA ASSOCIATES, LTD.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

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May, 1992

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LIST OF PARTIES

Petitioner is Robert Wayne Lee, plaintiff below. Respondent is Dr. Scott Calhoon, defendant below. Although petitioner contends the lawsuit, subsequent appeal and the Petition for Certiorari were sought against Scott Calhoon, Inc., the pleadings demonstrate that the corporation was never a named party (R. 1, 31), was never served (R. 7, 8), and that the plaintiff never moved to add the corporation as a party. The Trial Court's orders dismissing plaintiff's claims (R. 131, 135, 144, 156) from which plaintiff appeals demonstrate Scott Calhoon, Inc. was not considered by the Trial Court to be a party to this action.

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Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

OPINIONS BELOW

The United States Court of Appeals for the Tenth Circuit issued its opinion (No. 90-6013) on November 6, 1991 (App. at 1a) and denied petitioner's Motion for Rehearing and Suggestion for Rehearing En Banc on January 16, 1992. (App. at 43a.) The appeal was from a number of orders by the Trial Court, as cited by the Court of Appeals, including an Order of March 3, 1989 (R. 119, App. at 15a), Orders of March 16, 1989 (R. 121, App. at 17a; R. 123, App. at 19a), Order of June 27, 1989 (R. 131,

App. at 25a), Order of July 24, 1989 (R. 135, App. at 38a), Order of December 12, 1989 (R. 156, App. 40a), and judgment was entered in favor of respondent on December 12, 1989 (R. 157, App. at 42a).

STATEMENT OF THE CASE

Respondent's Statement of the Case is made pursuant to Rule 24.2 of the Rules of the Supreme Court and is made necessary by numerous inaccuracies and omissions in the petitioner's Statement of the Case. Many of these same factual inaccuracies have been propounded by the petitioner in the Trial Court and in the Appellate Court where both Courts on summary judgment and on appeal found no genuine issue of material fact to exist.

Petitioner has failed to present with accuracy, brevity and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration as required by Rule 14.5. Petitioner's attempt to again offer "disputed facts" is not supported by the record and is irrelevant to this Court's determination whether to accept certiorari. Respondent submits the following Statement of the Case material to the questions presented pursuant to Rule 14(g).

Petitioner, Robert Wayne Lee, plaintiff below, sued respondent, Scott Calhoon, M.D., defendant below, and certain other defendants for medical negligence in the amount of Thirteen Million Dollars ($13,000,000.00) and Twenty-Five Million Dollars ($25,000,000.00) punitive damages. (R. 1.) The plaintiff complained that defendant

negligently performed emergency surgery to treat plaintiff's perforated colon. Plaintiff's lawsuit was filed in the United States District Court for the Western District of Oklahoma on March 1, 1988. Because of the notoriety that often accompanies lawsuits seeking such huge damage awards, Dr. Calhoon was approached by a local news reporter and questioned about the lawsuit and plaintiff's allegations of medical malpractice. There was no evidence, as petitioner states, of "an unauthorized disclosure" based on "malicious" [sic] and "self interest." In response to questions by the reporter, Dr. Calhoon attempted to explain the medical facts pertinent to his defense of this Thirty-Eight Million Dollar ($38,000,000.00) lawsuit. (R. 132, Affidavit of Dr. Calhoon.)

There was no evidence, again as petitioner states, that defendant "withheld" medical records. Hospital medical records were in the custody of the hospital and not in the custody or possession of Dr. Calhoon and, no motion to obtain records was ever filed against Dr. Calhoon. Plaintiff below did not need to file a $38,000,000.00 lawsuit to obtain medical records. Section 19 of Title 76 of the Oklahoma Statutes entitled plaintiff to obtain copies of his medical records which were in the possession of codefendant, Baptist Medical Center. The discovery abuses petitioner alleges in his Petition simply are without foundation.[1]

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[1] *Plaintiff's admission that he filed a multimillion dollar, medical-negligence lawsuit without reviewing his own hospital records, in the hope that his lawsuit was not frivolous, speaks more to the*

(Continued on following page)

Plaintiff's original Complaint had alleged that Dr. Calhoon had not advised plaintiff prior to surgery, an appendectomy, that he might have a perforated bowel which would require a colostomy. Dr. Calhoon explained to the newspaper reporter who contacted and questioned him about such allegations that had plaintiff advised him or had he known prior to surgery that Mr. Lee was an AIDS carrier, Dr. Calhoon would have been alerted to the higher probability of a perforated bowel. (R. 132, Affidavit of Dr. Calhoon.) Plaintiff, in fact, was an AIDS carrier. (R. 48, 49.) Petitioner's statement in his brief that "there has never been . . . evidence from any other doctor that there is any connection whatsoever between the medical malpractice case and AIDS" is flatly inaccurate.[2] Plaintiff's own expert witness, testifying in deposition, agreed that the results of the HIV tests were extremely important in the medical care of Mr. Lee. (R. 83, 84, Deposition of James A. Fenimore, at 77.)

A perforated bowel is a common result of infections which are common with immuno-compromised patients who are AIDS carriers. (R. 132, Affidavit of Dr. Calhoon.) Had plaintiff advised Dr. Calhoon that he was an AIDS carrier, Dr. Calhoon would have informed plaintiff of the possibility of a perforated bowel which might require a colostomy. (R. 132, Affidavit of Dr. Calhoon.) Dr. Calhoon, in fact, only learned that plaintiff was an AIDS

(Continued from previous page)

judgment of his counsel. Plaintiff asserts wholly irrelevant and specious reasoning to argue that plaintiff's own ignorance of facts and law is somehow the fault of respondent.

[2] *See fn. 1, supra.*

carrier after surgery. (R. 128, Deposition of Dr. Calhoon.) The evidence showed that a test for exposure to HTLV-III antigen (an indicator of the AIDS virus) was ordered *not* by the defendant, but instead by an emergency room physician on the day of plaintiff's admission. (R. 128, Exhibit "1.") Plaintiff's own expert witness confirmed that Dr. Calhoon had not ordered the AIDS test. (R. 83, 84, Deposition of Dr. James Fenimore, at 78.) The results of the test were not learned by defendant until two (2) days later. (R. 153, Deposition of Carolyn Taylor.) Because plaintiff had failed to inform Dr. Calhoon and Dr. Calhoon did not know that plaintiff was an AIDS carrier, the initial working diagnosis prior to surgery had been "possible acute appendicitis." Thus, Dr. Calhoon's comments to the reporter were limited to the facts and issues relevant to his defense. (R. 132, Affidavit of Dr. Calhoon.)

Subsequent to publication of a newspaper article in *The Daily Oklahoman* setting out Dr. Calhoon's statements concerning his defense to the $38,000,000.00 malpractice lawsuit, plaintiff amended his Complaint to include claims for defamation, invasion of privacy, and breach of an implied agreement of confidentiality. Plaintiff alleged that defendant, notwithstanding the fact that plaintiff had filed the malpractice lawsuit, had publicly disclosed that plaintiff was "allegedly infected and suffering from Acquired Immune Deficiency Syndrome (AIDS.)" (R. 31.) The medical malpractice claims were subsequently dismissed by plaintiff against all parties including defendant, Scott Calhoon, M.D. (R. 86.)

The Trial Court ordered pursuant to 76 Oklahoma Statutes § 19 that the physician-patient privilege was waived following plaintiff's institution of the malpractice

action. (R. 17.) The Court ruled "any privilege granted by law concerning . . . any physical or mental condition of Robert Wayne Lee . . . has been waived by the filing of this action." (R. 17.) Plaintiff and defendant both filed Motions for Summary Judgment. (R. 48, 49, 93, 94.) On March 16, 1989, the Court granted summary judgment in defendant's favor on the defamation claim and denied both parties' motions for summary judgment on the invasion of privacy claim pursuant to Section 652(B) of the Restatement (Second) of Torts (Invasion Upon Seclusion). (R. 121, 123.) The Court requested supplemental briefs on plaintiff's claims of invasion of privacy pursuant to Section 652(D) of the Restatement and breach of an implied agreement of confidentiality. (R. 123.) The Trial Court subsequently concluded that defendant Calhoon was entitled to judgment on the claim for invasion of privacy under Section 652(D) and breach of privilege claims. (R. 131, 135.) Thus, the only remaining claim was plaintiff's Section 652(B) claim for intrusion upon seclusion and the Court permitted plaintiff additional time for discovery on the issue. (R. 135.) The Court subsequently granted judgment for defendant. (R. 144.)

However, plaintiff then filed a Motion to Reconsider (R. 146) which the Court granted and *again* permitted plaintiff additional time in which to conduct discovery. (R. 149.) The Trial Court ultimately ruled that plaintiff had failed to submit sufficient proof to controvert evidence by defendant that a Section 652(B) claim did not exist and granted summary judgment in the defendant's favor. (R. 156.) Judgment was entered consistent with the Orders entered on the various claims on December 12,

1989 (R. 157) and it was from this judgment that the appeal was taken.

The Tenth Circuit Court of Appeals affirmed the rulings of the Trial Court, finding that plaintiff had waived his physician-patient privilege and that defendant's statements were conditionally privileged and did not violate plaintiff's privacy under Section 652(B) of the Restatement of Torts. Plaintiff's contentions that the Trial Court had unduly limited discovery and that disputed factual issues and lack of consent for the AIDS test precluded dismissal on summary judgment were found by the Tenth Circuit to be without merit.

In addition to the inaccuracies in petitioner's Statement of the Case cited above, petitioner now alleges for the first time that respondent made a disclosure to the public "in the form of a newspaper release" as opposed to responding in an interview; that respondent's "cumulative gross assets are well in excess of Seven Hundred Million Dollars ($700,000,000.00);" and that petitioner "has been forced to quit his job, move to a new city, and change his name in order to avoid persecution and further embarrassment," and that he is forced to live "as a second class citizen." Again, any such "facts" are not to be found in the record, before the lower Courts.

SUMMARY OF THE ARGUMENT

The case petitioner seeks to have this Court review is a straightforward determination by the Tenth Circuit Court of Appeals that petitioner, plaintiff below, failed to meet his burden on summary judgment. There is nothing

in the Opinion by the Court of Appeals which demonstrates either a conflict with decisions of this Court, other courts of appeal, other decisions by the Tenth Circuit itself or an inappropriate application of state law. Certiorari has been sought inappropriately by the petitioner and cannot be supported under Rule 10 of the Rules of the Supreme Court.

ARGUMENT

I. PETITIONER HAS FAILED TO DEMONSTRATE ANY CONFLICT ARISING OUT OF THE COURT OF APPEALS' DECISION INTERPRETING THE RESTATEMENT (SECOND) OF TORTS OR THE APPLICATION OF STATE LAW TO SUPPORT THE GRANTING OF CERTIORARI.

Once again, in Proposition I of petitioner's Argument in support of his Petition for Writ of Certiorari, petitioner has presented an incomplete and therefore inaccurate statement of the facts pertaining to the decision by the District Court and the Circuit Court and facts therefore relating to a decision by this Court regarding certiorari.

Petitioner argues the District Court in its June 27, 1989 Order (R. 131, App. at 25a) "admitted that there was no evidence presented that the information" (given by Dr. Calhoon to a reporter) "was relevant to the medical malpractice action, but only 'apparently pertained' to the action. . . . " Accordingly, argues petitioner, there was no evidence of a legitimate concern to the public under 652(D)(b) of the Restatement and therefore the District Court and the Tenth Circuit erred in ruling that there was

no actionable invasion of privacy. Petitioner argues that the Court of Appeals has extended the meaning of Section 652(D)(b) creating an irreconcilable conflict with all other circuits in this Court.

Incredibly, petitioner has omitted significant portions of the District Court's June 27, 1989 Order and a subsequent Order by the District Court on July 24, 1989. (R. 135.) (Both Orders are conspicuously absent from petitioner's Appendix.) These Orders demonstrate unequivocally that the lower Courts' rulings were correct and based on evidence submitted by defendant Calhoon without any evidence supplied by plaintiff Lee. In the June 27, 1989 Order, the District Court ordered respondent Calhoon to provide, within five (5) days, evidence that his comments pertained to the defense of the lawsuit and granted petitioner ten (10) days therefrom to submit any evidence to the contrary. (R. 131 at 5, fn. 4.) The Trial Court postponed a final decision granting judgment in defendant's favor pending a review of evidence submitted by the parties. (*Id.* at 2, fn. 2.) Within three days Dr. Calhoon submitted an Affidavit affirmatively establishing the connection between his comments to a reporter and the medical malpractice lawsuit filed against him. (R. 132.) Plaintiff below filed *nothing* in support of Section 652(D) claim for invasion of privacy and, accordingly, on July 24, 1989 the District Court ruled "because the plaintiff has not submitted any evidence in support of his 652(D) . . . claim or his breach of confidentiality claim, to refute the evidence submitted by defendant, the Court's decisions with respect to these two claims are now final."

(R. 135 at 2.) The Tenth Circuit simply affirmed the District Court's holding. Thus, contrary to petitioner's argument there was no unreasonable extension of the Section 652(D)(b) principles or any irreconcilable conflict to support certiorari. The lower Courts merely recognized that petitioner, plaintiff below, failed to meet his burden on summary judgment. Under *Celotex Corp. v. Catrett*, 477 U.S. 316, 321 (1986) entry of summary judgment is mandated after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial.

Assuming arguendo, the existence of some conflict as to questions controlled by state law (i.e. application of the Restatement [Second] of Torts), this Court has held that conflict among the circuits is not a reason for granting a writ of certiorari. *Ruhlin v. New York Life Insurance Co.*, 304 U.S. 202, 206 (1938). Conflict may merely be a corollary to permissible differences of opinion in state courts. *Id.* Petitioner fails to demonstrate that the Tenth Circuit's ruling is in conflict with Oklahoma state law as expressed in *McCormack v. Oklahoma Publishing Co.*, 613 P.2d 737 (Okla. 1980). Here, the Tenth Circuit has reached a reasonable and permissible result under *McCormack*. The Tenth Circuit held a legitimate public concern under *McCormack* existed because plaintiff had filed a 38 million dollar lawsuit *and* because of the nature of the lawsuit. This Court has refused to review state-law questions where a decision by the highest Court of the state is ground for review of the Court of Appeals decision. *Butner v. United States*, 440 U.S. 48 (1979). This Court has said "[t]he

federal judges who deal regularly with questions of state law in their respective districts and circuits are in a better position than we to determine how local courts would dispose of comparable issues." *Id.* at 57.

As to any purported conflict between the decision by the Court of Appeals in the instant case and decisions of this Court cited by petitioner, petitioner must show an intolerable conflict. Petitioner must demonstrate a conflict on the *same matter* of law and fact, not merely an inconsistency in dicta or in the general principles utilized. *Layne and Bowler Corp. v. Western Well Works*, 261 U.S. 387, 392-93 (1923). Petitioner's references to *Time, Inc. v. Hill*, 385 U.S. 374 (1967), *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974) and *Cox Broadcasting v. Cohn*, 420 U.S. 469 (1975) do not demonstrate an intolerable conflict between this Court's recognition of the Constitutional guarantees of freedom of the press and respondent's interest in his own reputation as a medical provider and his right to protect that interest.

Similarly, petitioner has failed to demonstrate that any foundation for review by this Court of the lower Courts' rulings that petitioner had waived the physician-patient privilege thereby foreclosing an action for breach of implied warranty. Petitioner can only point to general principles as set out in *Doe v. Coughlin*, 697 F. Supp. 1234 (N.D. N.Y. 1988) and *Woods v. White*, 689 F. Supp. 874 (W.D. Wis. 1988), which are not irreconcilable with the instant case. Both cases are distinguishable and neither demonstrate the existence of any conflict. *Layne, supra* at 392-93. In *Woods*, the Court ruled that casual, unjustified dissemination of medical information by governmental employees to non-medical staff and prisoners was not a

discretionary function protected by qualified immunity. Public policy does not require the protection of non-discretionary governmental functions. However, in the instant case, once a patient has waived confidentiality concerning his medical condition, the public policy supporting the physician-patient privilege is not thwarted by discussion of such medical conditions. *Doe* concerned the automatic transfer of prisoners infected with AIDS to a special dormitory which the Court viewed as effectively revealing an inmate's medical condition without his consent. Here, petitioner affirmatively placed his medical condition in issue by filing his lawsuit and waived confidentiality of his medical condition. Certiorari is unnecessary to address any relationship of the instant case to either *Woods* or *Doe*.

Finally, petitioner argues the waiver issue should be reviewed by this Court because petitioner was "denied access to medical records" and that "it is beyond reasonable expectation that he voluntarily waived any right to privacy by filing the Complaint."[3] As pointed out above, petitioner was entitled to obtain his records pursuant to Section 19 of Title 76 of the Oklahoma Statutes. The hospital records were in the possession and control of Baptist Medical Center, *not* the respondent. 76 Oklahoma Statute § 19 provides:

> B. In cases involving a claim for personal injury or death against any practitioner of the healing arts or a licensed hospital, arising out of patient care, where any person has placed his physical or mental condition in issue by the commencement of any action, proceeding or suit

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[3] *See fn. 1, supra.*

> for damages, or where any person has placed in issue the physical or mental condition of any other person or deceased person by or through whom such person rightfully claims, he shall be deemed to waive any privilege granted by law concerning any communication made to a physician or health care provider with reference to any physical or mental condition or any knowledge obtained by such physician or health care provider by personal examination of any such patient provided that before any such communication, medical or hospital record or testimony is admitted in evidence in any proceeding it must be material and relevant to an issue therein, according to existing rules of evidence.

Review of the language of Section 19 reveals that waiver operates as a matter of law when any person has placed his physical or mental condition in issue by the commencement of an action. Under such circumstances "he *shall be deemed* to waive any privilege. . . . " (Emphasis added.)

Petitioner argues at Proposition III that because he did not give his consent to the surgery under *Smith v. Reisig*, 686 P.2d 554 (Okla. 1980) that somehow a question of fact was created to defeat summary judgment in favor of defendant. Certainly, it is well-established that consent to surgery is not required when a medical emergency exists such as in the present case. *Scott v. Bradford*, 606 P.2d 554 (Okla. 1980); (*See also*, R. 132, Affidavit of Dr. Calhoon). Respondent believes petitioner's argument is irrelevant to any question of waiver, or whether respondent's remarks were conditionally privileged, or whether petitioner was a public figure with a lawsuit which was a matter of public interest. It is important to note that

petitioner has raised issues of informed consent on appeal, where petitioner *dismissed* the very medical malpractice action asserting these same issues. (R. 86.) Petitioner inappropriately seeks certiorari to re-work his lawsuit.

Further, petitioner would have this Court believe that because his counsel's poorly managed discovery failed to yield documents sufficient to support his own summary judgment motion or to rebut respondent's summary judgment motions below that surely "other" information must exist and the only "explanation" is that documents have been withheld. Such speculation oversteps the bounds of advocacy and certainly is incapable of invoking this Court's jurisdiction.

II. ANY ALLEGED CONFLICT BETWEEN THE COURT OF APPEALS' OPINION IN THE INSTANT CASE AND A SUBSEQUENT DECISION OUT OF THE SAME CIRCUIT WILL NOT SUPPORT A WRIT OF CERTIORARI.

The Court of Appeals' decision below that there was no violation of breach of implied warranty of confidentiality was based in the first instance on petitioner's waiver of the physician-patient privilege. The Court of Appeals found the language of the Title 76 Oklahoma Statute § 19, "very plain, and all inclusive – it covered 'any privilege,' and 'any communication' with reference to 'any physical or mental condition.' " (App. at 11a.) Under Oklahoma law, where the language of a statute is plain and unambiguous, and its meaning clear, the statute

will be accorded the meaning as expressed by the language employed. *Cave Springs Public School Dist. I-30*, 613 P.2d 1046 (Okla. 1980).

In addition to the authority provided by Section 19 of Title 76, the Court found "*further* support" (emphasis added) for the finding of waiver of the physician-patient privilege in 12 Oklahoma Statute § 1443.1. (App. at 11a.) Section 1443.1 was not the exclusive basis for denial of the claim of breach of implied warranty of confidentiality. Any "error" arising out of the application of § 1443.1 does not support certiorari.

In addition, the case law relied on by petitioner does not support certiorari. The issue before the Court of Appeals in *Kleier Advertising, Inc. v. Premier Pontiac, Inc.*, 921 F.2d 1036 (10th Cir. 1990), cited by petitioner, was whether a businessman's statements to a newspaper about a copyright infringement action against his company were privileged under Section 1443.1 so as to defeat a defamation action. No collateral issue of an express waiver pursuant to 76 Oklahoma Statute § 19 was before the Court in *Kleier*. Thus, the *Kleier* decision is distinguishable from the instant case on the facts and the law and no conflict exists to support a writ of certiorari. *Layne and Bowler Corp. v. Western Well Works*, 261 U.S. 387, 392-93 (1923). In addition, this Court has denied certiorari where there were inconsistent decisions by the Court of Appeals within the same circuit. *Davis v. United States*, 417 U.S. 333, 340 (1974). It has been suggested that such conflicts are intracircuit conflicts to be resolved by the Court of Appeals itself. *Id.* Thus, to the extent any such conflict may be perceived to exist in the instant case, it

should be resolved by the Tenth Circuit and review by this Court is not required.

CONCLUSION

For the above reasons, respondent submits that petitioner has failed to demonstrate a foundation for review by this Court under Rule 10 of the Rules of the Supreme Court. Therefore, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 90-6013
ROBERT WAYNE LEE,

Plaintiff-Appellant,

vs.

DR. SCOTT CALHOUN,

Defendant-Appellee,

SCOTT W. CALHOUN, M.D., Inc.,

Defendant.

[Filed November 6, 1991]

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
(D.C. No. Civ. 88-354-T)

Dianna S. Wisdom, Oklahoma City, Oklahoma, for Plaintiff-Appellant.

George W. Paull, Jr., (George F. Short and Cynthia L. Sparling, Oklahoma City, Oklahoma; of counsel, Short, Barnes, Wiggins, Margo & Adler, with him on the brief) for Defendant-Appellee Scott Calhoon, M.D.

Before MOORE AND EBEL, Circuit Judges, and BROWN,* Senior District Judge.

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* Honorable Wesley E. Brown, United States Senior District Judge, District of Kansas, sitting by designation

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BROWN, Senior District Judge.

Plaintiff Robert Wayne Lee filed suit for medical malpractice. The claim arose from emergency surgery performed upon plaintiff to repair a perforated bowel. When the suit was filed, a reporter approached the defendant Dr. Calhoon.[1] The doctor explained that plaintiff's medical condition, requiring emergency surgery, was a consequence of patients who are AIDS carriers. This explanation appeared in a news item published in *The Daily Oklahoman*.

The facts are not in dispute. Plaintiff went to the emergency room of Baptist Hospital on May 3, 1987. He was examined by Dr. Crook and Dr. Camp, who diagnosed "possible acute appendicitis," and defendant Dr. Calhoon was called in for an evaluation. (Record Vol. II, Item 152.) Dr. Crook and Dr. Camp are not defendants in this action. Plaintiff signed a consent form for an appendectomy. Dr. Calhoon operated on the plaintiff. The surgery revealed that he suffered from a perforated bowel rather than appendicitis. Dr. Calhoon therefore performed a colostomy. A blood test subsequently revealed that plaintiff had tested positive for AIDS (the "HIV" virus).

Plaintiff then filed suit claiming Calhoon had misdiagnosed his condition and failed to obtain his consent

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[1] "Calhoon" is the correct spelling of defendant's surname.

for the unnecessary surgical procedure which was performed. Plaintiff's complaint, filed March 1, 1988, sought $38 million damages. The interview with the reporter took place on March 2, the day after the lawsuit was filed. The news item which appeared in the Daily Oklahoman was as follows:

> Calhoon said Tuesday that Lee needed emergency surgery because he had a perforated colon and was infected with the acquired immune deficiency syndrome virus.
>
> "He was seen in the emergency room and thought to have appendicitis," Calhoon said.
>
> "This was before we identified that he was a carrier of the AIDS virus. He needed emergency surgery and at that time a perforated colon was identified.
>
> "Life-saving surgery was performed, which was a temporary colostomy. He had a preoperative diagnosis of appendicitis because he gave us no history of being an AIDS carrier.
>
> "If we had known of his AIDS exposure, other more esoteric types of infections, which are common in immuno-compromised hosts, would have been considered." Calhoon.

After this story appeared in the paper, plaintiff amended his complaint to include defamation, invasion of privacy, and breach of doctor/patient confidentiality.

The malpractice claim was dismissed,[2] and summary judgments were entered in favor of defendant Calhoon

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[2] Plaintiff moved to dismiss with prejudice all of the defendants in this action with regard to his medical

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upon findings that plaintiff had waived his physician-patient privilege, and that plaintiff had failed to establish his right to proceed on his claims of defamation, invasion of privacy, and "intrusion upon seclusion."

In this appeal plaintiff contends that the district court erred in findings that plaintiff had waived the physician/patient privilege, and had further erred in finding that Dr. Calhoon's statements were conditionally privileged and did not violated plaintiff's privacy under Restatement (Second) of Torts § 652B. Plaintiff further contends that the trial court unduly limited discovery, and that disputed factual issues, and lack of consent for administering the AIDS test precluded dismissal of his claims by summary judgment.

Following our review of the record, we find no error and affirm the judgment.

The trial court entered a number of orders on cross motions for summary judgment before reaching a final judgment in this case, and it is necessary to discuss these in some detail.

By an order of March 3, 1989, the court dismissed plaintiff's claims of defamation, invasion of privacy and breach of confidentiality against Baptist Medical Center,

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malpractice claims and to dismiss without prejudice the defendants Baptist Medical Center of Oklahoma, Oklahoma Healthcare and Baptist Medical Plaza Associates with regard to his invasion of privacy and disclosure of private information claims, reserving these claims only as to Dr. Calhoon. Record. Vol. I, Item 86.

Oklahoma Health Care & Baptist Medical Plaza Associated (Record Vol. I, Docket No. 119); and by order of March 16, (Docket No. 124), the court found that plaintiff failed to state a claim against these defendants, and their motion to dismiss was granted.

Additional orders were entered on March 16, (Record Vol. II, Docket Nos. 122, 123, 124). The court found that Dr. Calhoon was entitled to summary judgment on the plaintiff's defamation claim because his statement regarding plaintiff's status as an AIDS carrier was true. The court denied both parties' motions for summary judgment on other claims. The parties were directed to supplement the record with reference to plaintiff's claims for invasion of privacy as set out under Restatement (Second) of Torts § 652A. Thus, one who invades the privacy of another is liable for resulting harm when there is an "unreasonable intrusion upon the seclusion of another" (§ 652B), or "appropriation of the other's name or likeness" (§ 652C), or "publicity that unreasonably places the other in a false light before the public (§ 652E).

Plaintiff's claim of "intrusion upon seclusion" is based on provisions of § 652B:

> One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

Section 652B liability does not require publication of private matters. The invasion may consist of forced entry into a person's home, eavesdropping or spying upon a

person's private affairs, or tampering with a person's private papers or mail.

Plaintiff's "invasion of privacy" claim is based upon § 652D which provides in pertinent part that:

> One who gives publicly to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that
>
> (a) would be highly offensive to a reasonable person, and
>
> (b) is not of legitimate concern to the public.

Liability under this section is based upon publicity given to true statements of fact. "There is no liability when the defendant merely gives further publicity to information about the plaintiff that is already public." Comment b, § 652D.

In *McCormack v. Oklahoma Publishing Co.*, 613 P. 2d 737 (Okl. 1980), the Oklahoma court recognized a right of action for invasion of privacy, if a plaintiff could establish the public disclosure of a private fact, when such fact was not of "legitimate public concern."[3]

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[3] In *McCormack* a news story related that plaintiff, "a one-time gambler and illegal casino operator in Oklahoma City," had connections with the Mafia and organized crime. Plaintiff claimed that the events mentioned occurred more than twenty years before, and that the publication invaded his right of privacy. While recognizing the tort of invasion of privacy, the court found that plaintiff made no allegation that the facts were private and not of public record, and did not allege that the facts were not of legitimate public concern. Dismissal of the

(Continued on following page)

The district court correctly found that plaintiff became a figure by filing his lawsuit, since the size of his claim – $38 million – and the nature of the claim – malpractice, had attracted the attention of the news media. As the court noted, these matters are of legitimate public concern "because of the public interest or debate regarding the size of litigation claims and jury awards . . . and the public concern in policing failures in the medical profession." In *Gilbert v. Medical Economics Company,* 665 F. 2d 305 (10th Cir. 1981), the defendant published an article discussing the personal and professional problems of a physician involved in two incidents of alleged malpractice. This court affirmed the grant of summary judgment to the publisher, recognizing that the article was of legitimate public interest, since it involved the competency of licensed professionals. We there noted that the publication of plaintiff's psychiatric and marital problems were "substantially relevant to the newsworthy topic," through "the rational inference that plaintiff's personal problems were the underlying cause of the acts of alleged malpractice." *Gilbert v. Medical Economics Co. supra,* 665 F. 2d at 308-309.

With respect to the question of whether the doctor's comments pertained to his defense of the lawsuit, the court ordered Dr. Calhoon to provide evidence of this fact within five days of the order. On June 30, Dr. Calhoon

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(Continued from previous page)

case was affirmed upon the finding that there could be no liability for publicizing facts which were matters of public record.

supplied an affidavit establishing this connection (Record Vol. II, Item 132):

> I affirmatively state that the statement made by me in response to questions by the newspaper reporter, and as printed in the newspaper article at issue in this case, were simply expressions of the facts and issues relevant to my defense in this multi-million dollar lawsuit about which I was being questioned. Mr. Lee's original lawsuit alleged that I did not advise him prior to the surgery that he might have a perforated bowel and require a colostomy. In my defense, had Mr. Lee advised me or had I known prior to surgery that Mr. Lee was an AIDS virus carrier, I would have been alerted to a higher probability that he might have a perforated bowel due to more esoteric types of infections which are common with immuno-compromised patients such as Mr. Lee, and I would have so informed him.

In this case, Dr. Calhoon's comments clearly pertained to his defense of the lawsuit, and, as found by the trial court, "were sufficiently related to the news story to preclude them from serving as the basis for an invasion of privacy claim."

The district court also found that defendant Calhoon was entitled to summary judgment on plaintiff's § 652 invasion of privacy claim because even if the plaintiff had not become an involuntary public figure, with a lawsuit which was a matter of public interest, Dr. Calhoon's statements were conditionally privileged under § 594. The elements of conditional privilege as set out in § 593 provide that one who publishes defamatory material is not liable if "the matter is published upon an occasion

that makes it conditionally privileged, and the privilege is not abused." The trial court correctly found that the defendant did not abuse the conditional privilege. Section 594 of the Restatement provides that:

> An occasion makes a publication conditionally privileged if the circumstances induce a correct or reasonable belief that
>
> (a) there is information that affects a sufficiently important interest of the publisher, and
>
> (b) the recipient's knowledge of the defamatory matter will be of service in the lawful protection of the interest.

The principle set out in § 594 simply means that one whose reputation is under attack has the right to defend himself:

> A conditional privilege exists . . . when the person making the publication reasonably believes that his interest in his own reputation has been unlawfully invaded by another person and that defamatory matter that he publishes about the other is reasonably necessary to defend himself. The privilege here is analogous to that of self-defense against battery, assault or false imprisonment . . . Thus the defendant may publish in an appropriate manner anything that he reasonably believes to be necessary to defend his own reputation against the defamation of another . . . (Comment k, § 594)

The occasion upon which Dr. Calhoon made his statement and explanation, in response to the reporter's inquiry into the circumstances of the lawsuit, was clearly an instance in which Dr. Calhoon was entitled to provide

information that affected his important interest in his own reputation as a medical provider. Plaintiff failed to provide any evidence that defendant abused his conditional privilege, and under such circumstance, the trial court properly entered summary judgment in favor of defendant upon the § 652 invasion of privacy claim.

As to plaintiff's claim for breach of an "implied agreement of confidentiality," the district court found that plaintiff had waived the physician-patient privilege under 76 Okl. Stat. § 19, which provides in pertinent part that:

> In cases involving a claim for personal injury or death against any practitioner of the healing arts or a licensed hospital, arising out of patient care, where any person has placed his physical or mental condition in issue by the commencement of any action, proceeding or suit for damages, . . . *shall be deemed to waive any privilege* granted by law concerning *any* communication made to a physician or health care provider . . . or *any* knowledge obtained by such physician or health care provider by personal examination of any such patient; provided that, before any such communication, medical or hospital record or testimony is admitted in evidence in any proceeding it must be material and relevant to an issue therein according to existing rules of evidence. (Emphasis supplied.)

It is clear that Dr. Calhoon's comments were entirely relevant to the medical malpractice action in question, and the information he gave was the subject matter of his defense to plaintiff's allegation of malpractice. Indeed, his explanation of the cause and need for emergency

surgery entirely justified the dismissal of all malpractice claims. Here the Oklahoma statute is very plain, and all inclusive – it covered "any privilege," and "any communication," with reference to "any physical or mental condition." Under Oklahoma law the language of the statute must prevail. In *Cave Springs Public School District I. 30.* 613 P. 2d 1046 (Okl. 1980), the rule was stated in this manner:

> Where the language of a statute is plain and unambiguous, and its meaning clear and no occasion exists for the application of rules on construction, the statute will be accorded the meaning as expressed by the language therein employed.

Further support for the finding of a waiver of the physician-patient privilege is found in the trial court's reference to 12 O.S. § 1443.1, which provides that expressions of opinion in regard to judicial proceedings are not actionable as libel:

> 1443.1. Privileged communications defined – Exemption from libel
>
> A. A privileged publication or communication is one made:
>
> First. In any legislative or judicial proceeding or any other proceeding authorized by law;
>
> Second. In the proper discharge of an official duty;
>
> Third. By a fair and true report of any legislative or judicial or other proceeding authorized by law, or anything said in the course thereof, and any and all expressions of opinion in regard thereto, and criticisms thereon, and any and all

> criticisms upon the official acts of any and all public officers, except where the matter stated of and concerning the official act done, or of the officer, falsely imputes crime to the officer so criticized.
>
> B. No publication which under this section would be privileged shall be punishable as libel.

The trial court properly ruled that plaintiff waived the physician-patient privilege, and the entry of summary judgment in favor of defendant upon the claim of breach of the implied warranty of confidentiality was appropriate.

With respect to plaintiff's "invasion of privacy" claim, (§ 652B, *supra*, intrusion upon seclusion) which was based upon the allegation that blood had been drawn for the AIDS test without his permission, the court permitted the parties to submit additional information concerning the matter.

On July 24, 1989, the court allowed plaintiff time to conduct additional discovery "limited to the question of whether defendant Calhoon ordered the AIDS tests or knew that they had been ordered and approved or ratified such." (Record Vol. II, Item 135).

On October 11, 1989, the court entered an order and final judgment granting defendant Calhoon summary judgment on plaintiff's remaining claim for invasion of privacy under § 652B because plaintiff failed to provide evidence to support such claim. Record Vol. II, Items 144, 145. On plaintiff's motion, the order and judgment were vacated and plaintiff was granted additional time until December 4 to conduct any further discovery necessary

to establish his invasion of privacy claim. Record Vol. II, Item 149, Order of November 1, 1989. After reviewing all of the evidence presented by the parties on the issue, the court determined that plaintiff had failed to submit sufficient proof to controvert the evidence submitted by Dr. Calhoon which was to the effect that he did not order or authorize AIDS tests on the occasion in question. In accordance with these findings, judgment was again entered in favor of defendant, Dr. Calhoon. (Order and Judgment of December 12, 1989, Record Vol. II, Items 156, 157.)

In sworn statements, Dr. Calhoon denied that he ordered tests to determine plaintiff's AIDS status. (Vol. II, Item 128, Exhibits "A," "B"). Dr. Calhoon first learned that plaintiff was HIV positive on May 5, two days following the operation.

Plaintiff's argument that the tests were ordered by Dr. Calhoon is pure speculation and contrary to the evidence presented to the trial court. In lab reports submitted by plaintiff himself, several other doctors are noted as requesting tests – i.e., Doctors Gilcher, Crook, Camp, and "Non-Staff M.D." (Record Vol. II, Exhibits to Item 133.)

On the basis of affidavits and depositions presented on the issue the trial court made these findings:

> The plaintiff has filed his supplemental response and, in addition to failing to explain his exhibit "B," has failed to submit sufficient proof to controvert the evidence submitted by the defendant that he did not order or authorize either of the two AIDS tests. To the contrary, the only credible evidence establishes that the initial

> test was ordered by Dr. Crook and the subsequent test was automatically required by the Baptist Medical Center's blood bank due to the results of the HTLV-III test.[4]

Plaintiff failed to submit any evidence to controvert defendant's evidence that Dr. Calhoon was not the one who ordered the AIDS test. The trial court properly dismissed the § 652B complaint because there was no genuine issue of conflicting material facts on the issue.

The rulings and judgment of the trial court were correct in all respects, and the Judgment is AFFIRMED.

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[4] See Depositions, Record Vol. II, Exh. A to Docket 153 and Docket 154, Deposition of Carolyn Taylor, Baptist Medical Center Blood Bank.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

ROBERT WAYNE LEE, Plaintiff, vs. BAPTIST MEDICAL CENTER OF OKLAHOMA, INC.; DR. SCOTT CALHOUN; OKLAHOMA HEALTHCARE CORPORATION; AND BAPTIST MEDICAL PLAZA ASSOCIATES, LTD., Defendants.	)	No. CIV-88-354-T (Filed Mar. 3, 1989)

ORDER

Upon written stipulation, the parties request the Court dismiss with prejudice plaintiff's claims of defamation, invasion of privacy and breach of confidentiality as to the defendant hospital entities only, thereby dismissing all causes of action against Baptist Medical Center of Oklahoma, Inc., Oklahoma Healthcare Corp. and Baptist Medical Plaza Associates, Ltd. Accordingly, plaintiff's claims of defamation, invasion of privacy and breach of confidentiality against Baptist Medical Center of Oklahoma, Inc., Oklahoma Healthcare Corp. and Baptist Medical Plaza Associates, Ltd. only are dismissed with prejudice and plaintiff reserves these claims against Dr. Scott Calhoun and Scott Calhoun, M.D., Inc.

IT IS SO ORDERED this 3rd day of March, 1989.

/s/ Ralph G. Thompson
UNITED STATES
DISTRICT JUDGE

ENTERED IN JUDGMENT DOCKET ON 3-3-89

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

ROBERT WAYNE LEE, Plaintiff, vs. BAPTIST MEDICAL CENTER OF OKLAHOMA, INC., et al., Defendants.	)	NO. CIV-88-354-T (Filed Mar. 16, 1989)

ORDER

Plaintiff Robert W. Lee has filed a motion for partial summary judgment which is ruled upon as follows.[1] With respect to the plaintiff's claims against defendant Baptist Medical Center of Oklahoma, Inc. ("Baptist"), the court concludes the jury should determine whether Baptist may be held liable for defendant Calhoun's conduct under the doctrine of respondeat superior. As the court has granted summary judgment in favor of defendant Calhoun and defendant Baptist on the plaintiff's defamation claim, the plaintiff's motion, insofar as it pertains to his slander and libel claims is denied, as is his request for judgment on his § 652B invasion of privacy claim. Ruling is deferred on the plaintiff's § 652D invasion of privacy claim and his breach of an implied agreement of confidentiality claim,[2]

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[1] The reasons for the court's decisions are contained in the orders entered on defendant Calhoun's and defendant Baptist's summary judgment motions.

[2] Subsequent to the court's decision on these claims, a ruling will be made on the defendants' pending motion to compel.

pending receipt of supplemental briefs on these issues, which the court has directed the parties to file.

IT IS SO ORDERED this 16th day of March, 1989.

/s/ Ralph G. Thompson
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

ROBERT WAYNE LEE, Plaintiff, vs. BAPTIST MEDICAL CENTER OF OKLAHOMA, INC., et al., Defendants.	)	NO. CIV-88-354-T (Filed Mar. 16, 1989)

ORDER

Plaintiff Robert Wayne Lee instituted this action against Baptist Medical Center of Oklahoma, Inc.; Dr. Scott Calhoun; Oklahoma Health Care Corporation and Baptist Medical Plaza Associates, Ltd. seeking to recover for alleged medical negligence arising out of emergency surgery performed on the plaintiff. Subsequent to the publication of a newspaper article in The Daily Oklahoman, which contained statements made by defendant Calhoun and related certain facts about the plaintiff's medical malpractice suit, the plaintiff amended his complaint to add allegations of defamation, invasion of privacy and breach of an implied agreement of confidentiality. Defendant Scott Calhoun, M.D. has filed a motion for partial summary judgment contending that the plaintiff was not defamed because the statements he made, which appeared in the newspaper article, were true; that the plaintiff's privacy was not invaded by Dr. Calhoun's statements or by the tests conducted on the plaintiff's blood for exposure to the HTLV-III antigen; and that,

because the plaintiff waived the physician-patient privilege by filing this lawsuit, he cannot recover for breach of an implied agreement of confidentiality. For the following reasons, the court concludes that the defendant's motion should be granted in part, denied in part and deferred in part.

The plaintiff's claims, other than his cause of action for medical malpractice, are based on the divulgence by Dr. Calhoun of the fact that the plaintiff is a carrier of Acquired Immune Deficiency Syndrome virus,[1] and the publication of his statement. Defendant Calhoun seeks summary judgment on the plaintiff's defamation claim, on the ground that his statement regarding the plaintiff's status as an AIDS carrier is true. As proof, defendant Calhoun has attached to his motion a copy of the plaintiff's laboratory report. The plaintiff fails to respond to the defendant's evidence or to address his truth defense, which is a complete defense to a libel or slander action. 12 Okl. Stat. § 1444.1. *See Miskovsky v. Oklahoma Pub. Co.*, 654 P.2d 587 (Okl. 1982), *cert. denied*, 459 U. S. 923 (1982) (libel action); 12 Okl. Stat. § 1442 ("Slander is a *false* and unprivileged publication . . .) (emphasis added). Accordingly, defendant Calhoun is entitled to summary judgment on the plaintiff's defamation claim.

The plaintiff asserts that his privacy was invaded when unauthorized laboratory tests were conducted on his blood and when Dr. Calhoun publicly made statements regarding the plaintiff's status as a carrier of the AIDs virus. The Oklahoma courts have recognized the

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[1] *The plaintiff does not dispute the accuracy of this fact.*

tort of invasion of privacy as set out in the Restatement (Second) of Torts, *McCormack v. Oklahoma Pub. Co.*, 613 P.2d 737 (Okl. 1980)[2], and have held that one who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person. *Munley v. ISC Financial House, Inc.*, 584 P.2d 1336 (Okl. 1978). Restatement (Second) of Torts § 652B.

Defendant Calhoun argues that factors that are considered in determining the existence of an actionable intrusion are the means used to gain access to the alleged private information and the defendant's purpose for obtaining the information. Dr. Calhoun asserts that his knowledge of the plaintiff's carrier status "was the necessary result of the diagnostic procedures and the medical care and treatment of this patient, all of which were for legitimate medical purpose." Defendant Calhoun's Brief, p. 4. He also contends that to prevail on his claim for invasion of privacy based upon unreasonable intrusion, the plaintiff must establish an intentional interference in the solitude or seclusion of his physical being or a prying into his private affairs. Neither has been established here, defendant Calhoun asserts, because he did not order or request the laboratory studies that identified the plaintiff as a carrier of the AIDs virus.

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[2] *In McCormack, the Oklahoma Supreme Court recognized the tort of invasion of privacy in the four categories enumerated in the Restatement (Second) of Torts. Only two are pertinent here, unreasonable intrusion and unreasonable publicity.*

In response, plaintiff contends that the test for exposure to the HTLV-III antigen was unauthorized and without his consent.[3] Consequently, a fact question appears to exist on the issue of whether defendant Calhoun made an intentional, unreasonable intrusion upon the plaintiff by performing an unnecessary and unauthorized test. Summary judgment on the plaintiff's claim for invasion of privacy premised on § 652B of the Restatement (Second) of Torts, intrusion upon seclusion, is, therefore, denied.[4]

The plaintiff also asserts that his privacy was invaded under § 652D of the Restatement (Second) of Torts, which provides:

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that
>
> > (a) would be highly offensive to a reasonable person, and

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[3] *The court would note that neither party submitted any evidence on this issue.*

[4] *It is unclear whether plaintiff is actually asserting a claim for unreasonable intrusion or simply one for unreasonable publicity, as he states in his brief that his objection is the "subsequent misuse of such confidential information by the defendant Calhoun through its disclosure to the public via The Daily Oklahoman newspaper". Plaintiff's brief, p.8. Because of the plaintiff's statement that the blood test was performed without his consent, the court assumes plaintiff intends to pursue his § 652B claim. The court will reconsider its denial of summary judgment on this claim if it determines that the statements were privileged.*

(b) is not of legitimate concern to the public.[5]

Unquestionably, the statements plaintiff complains of were made public and generally would be offensive to a reasonable person. However, the court has not been convinced that the divulged facts were private, were not of public record, and were not of legitimate public concern. The parties' briefs do not adequately address these issues. The briefs also do not discuss the possibility that the defendant's statements may have been protected by a conditional privilege. See Restatement (Second) of Torts §§ 652G, 594. The plaintiff and defendant Calhoun are directed to supplement their briefs on these points within twenty (20) days.[6]

The remaining claim of the plaintiff on which defendant Calhoun seeks summary judgment, is his cause of action for breach of an "implied agreement of confidentiality". Defendant Calhoun contends that he did not breach the confidential physician-patient relationship because the plaintiff, by commencing this lawsuit, waived the physician-patient privilege under 76 Okl. Stat. § 19. The defendant relies exclusively on the statutory language in support of his argument and fails to cite any

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[5] *To state a cause of action for invasion of privacy by publicity being given to a party's private life, it is not necessary that the statements be false.* McCormack v. Oklahoma Pub. Co., *613 P.2d 737 (Okl. 1980).*

[6] *Plaintiff asserts that the issues of public interest are limited to the allegations he has made in his complaint. This position ignores the fact that the plaintiff's status as a carrier of the AIDS virus may have been a partial defense to the plaintiff's malpractice claim, which has been dismissed.*

other authority. While the court does not concur with the plaintiff's very limited interpretation of 76 Okl. Stat § 19B, that any waiver by the plaintiff is limited to statements made in a hearing or a court sanctioned proceeding, it concludes that neither party has adequately addressed this issue. They both are directed to supplement their briefs within twenty days on the question of to what extent did the plaintiff, by the commencement of this action, waive the doctor-patient privilege.

IT IS SO ORDERED this 16th day of February, 1989.

/s/ Ralph G. Thompson
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

ROBERT WAYNE LEE,	)	
Plaintiff,	)	No. CIV-88-354-T
vs.	)	(Filed Jun. 27, 1989)
DR. SCOTT CALHOON,	)	
Defendant.	)	

ORDER

Plaintiff Robert Wayne Lee instituted this action against Dr. Scott Calhoon seeking to recover for alleged medical negligence arising out of emergency surgery performed on the plaintiff.[1] Subsequent to the publication of a newspaper article in The Daily Oklahoman, which contained statements made by defendant Calhoon about the plaintiff's medical malpractice suit, the plaintiff amended his complaint to add claims for defamation, invasion of privacy and breach of an implied agreement of confidentiality. Defendant Calhoon filed a motion for partial summary judgment contending that the plaintiff was not defamed because the remarks he made, which appeared in the newspaper article, were true; that the plaintiff's privacy was not invaded by his statements or by the tests conducted on the plaintiff's blood for exposure to the HTLV-III antigen; and that, because the plaintiff waived the physician-patient privilege by filing this lawsuit, he cannot recover for breach of an implied agreement of an

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[1] Plaintiff originally asserted claims against other defendants, but they, together with the plaintiff's medical malpractice claim, have been dismissed with prejudice.

confidentiality. The plaintiff subsequently moved for partial summary judgment on his defamation, invasion of privacy and breach of confidentiality claims. The court granted summary judgment in favor of defendant Calhoon on the defamation claim and, principally because of the absence of any evidence provided by the parties, denied both parties' motion insofar as they pertained to the plaintiff's invasion of privacy claim premised on § 652B of the Restatement (Second) of Torts (intrusion upon seclusion). Rulings on the plaintiff's remaining claims for invasion of privacy under § 652D of the Restatement (Second) of Torts and for breach of an implied agreement of confidentiality were deferred pending receipt of supplemental briefs. Having reviewed the parties' additional briefs, the court concludes that defendant Calhoon is entitled to judgment on the plaintiffs' § 652D and breach of privilege claims,[2] for reasons stated subsequent to a brief summary of the undisputed facts.

The plaintiff was examined at the Baptist Medical Center emergency room by defendant Calhoon, where he was diagnosed as having acute appendicitis. He underwent surgery for an appendectomy, but discovered after awaking from the operation, that a colostomy had been performed. The plaintiff instituted suit alleging that the defendant misdiagnosed his condition and failed to obtain his consent for the unnecessary surgical procedure performed. A reporter then contacted defendant Calhoon

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[2] The court's decision with respect to these two claims will not be final and may be modified, depending upon the proof which the parties submit in accordance with the court's subsequent directive.

regarding the litigation. The defendant told the newspaper reporter that he had not known before the operation that the plaintiff was an AIDS carrier and, thus, was confronted during the surgery with a medical condition different from what he had anticipated. The possibility of causes for the plaintiff's condition, other than appendicitis, would have been considered, defendant Calhoon stated, if he had known that the plaintiff was infected with AIDS. These statements were reported in a newspaper article that was published in The Daily Oklahoman, and form the basis for the plaintiff's invasion of privacy and breach of confidentiality claims.

The plaintiff's invasion of privacy claim is based on § 652D of the Restatement (Second) of Torts, which provides:

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that
>
> > (a) would be highly offensive to a reasonable person, and
> >
> > (b) is not of legitimate concern to the public.

The elements of a § 652D privacy claim are a public disclosure, that would be offensive to a reasonable person, of private facts that are not of legitimate public concern. *McCormack v. Oklahoma Publishing Co.*, 613 P.2d 737 (Okl. 1980). It cannot be disputed that defendant Calhoon publicly disclosed a personal matter, and the court previously concluded in its March 16, 1989 order, that the statements would be offensive to a reasonable person. Therefore, the issues to be determined are

whether the defendant's divulgence was of legitimate concern to the public or was privileged.

Defendant maintains that the plaintiff made his physical condition a matter of public record and interest by filing his lawsuit, citing comment f to § 652D, which provides:

> f. Involuntary public figures. There are other individuals who have not sought publicity or consented to it, but through their own conduct or otherwise have become a legitimate subject of public interest. They have, in other words, become 'news' . . . The same is true as to those who . . . are involved in judicial proceedings or other events that attract public attention. These persons are regarded as properly subject to the public interest, and publishers are permitted to satisfy the curiosity of the public as to its heroes, leaders, villains and victims, and those who are closely associated with them. As in the case of the voluntary public figure, the authorized publicity is not limited to the event that itself arouses the public interest, and to some reasonable extent includes publicity given to facts about the individual that would otherwise be purely private.

The court concurs with the defendant, concluding that the plaintiff became an involuntary public figure by the institution of the action. Whether because of the size of the prayer for relief – $38,000,000.00 – or because of the nature of his claim – malpractice – the litigation attracted the attention of the news media. However, the mere fact that the press was interested, does not alone make the plaintiff a public figure. He, because of his lawsuit, must have become a "legitimate subject of public interest." The

court interprets this phase as a requirement that the plaintiff's lawsuit be a newsworthy topic.[3] That condition is satisfied because of the public interest or debate regarding the size of litigation claims and jury awards (often referred to as the insurance liability crisis or tort reform), and the public concern in policing failures in the medical profession. See *Gilbert v. Medical Economics Co.*, 665 F.2d 305 (10th Cir. 1981).

The mere fact that the plaintiff's action is of legitimate public concern does not, however, protect the defendant's statements. They still will be actionable if they do not have "some substantial relevance to a matter of legitimate public interest." Id at 308. Restatement (Second) of Torts, comment f ("and to some *reasonable extent* includes publicity given to facts about the individual that would otherwise be purely private.") (emphasis added) Some private facts about a public figure may lie outside the protected sphere of legitimate public interest. *Gilbert v. Medical Economics Co.*, 665 F.2d at 308. The defendant's comments, though, apparently pertained to his defense of the lawsuit[4] and, thus, the court determines they were sufficiently related to the news story to preclude them

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[3] Not all matters are of legitimate public interest. "The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake with which a reasonable member of the public with decent standards, would say that he had no concern." Restatement (Second) of Torts § 652D, comment h.

[4] Defendant Calhoon is directed to provide evidence of this fact, not bald statements in a brief, within five (5) days. Plaintiff is granted ten (10) days therefrom to submit any contrary evidence.

from serving as the basis for an invasion of privacy claim. See *Sipple v. The Chronicle Publishing Co.*, 154 Cal. App.3d 1040 (Cal. Ct. App. 1984) (newspaper articles' reference to the plaintiff's homosexuality did not constitute an invasion of privacy because the fact was newsworthy or of legitimate public interest). See generally *Glenn v. Kerlin*, 248 So.2d 834 (La.Ct.App. 1971) (Plaintiff failed to state a cause of action for invasion of privacy against his doctor, for conferring with defense attorneys because, by filing a suit to recover for personal injuries, he made a legal issue of his physical condition).

Even if the court had found that the plaintiff was not an involuntary public figure and his lawsuit not a legitimate subject of public interest, to the extent the defendant has been accused of invading the plaintiff's privacy, his statements are conditionally privileged. Section 652G of the Restatement (Second) of Torts makes certain conditional privileges applicable to the publication of any matter that is an invasion of privacy. Among them is the privilege to protect the publisher's interest, which is found in § 594. That section provides:

> An occasion makes a publication conditionally privileged if the circumstances induce a correct or reasonable belief that
>
> > (a) there is information that affects a sufficiently important interest of the publisher, and
> >
> > (b) the recipient's knowledge of the defamatory matter will be of service in the lawful protection of the interest.

The conditional privilege will shield the defendant from liability for his statements if the privilege is not

abused. Restatement (Second) of Torts, § 593. It exists, under circumstances such as those present in this case, where the person making the publication reasonably believes "that his interest in his own reputation has been unlawfully invaded by another person and that the defamatory matter that he publishes about the other is reasonably necessary to defend himself." Comment k to § 594. Warren and Brandeis, The Right to Privacy, 4 Harv. L.Rev. 213, 217 (1890). Although the privilege may be lost through abuse, see §§ 599-605A. no evidence regarding abuse, has been presented to the court.[5] Therefore, under

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[5] See notes 2 and 4, supra. The court does not find the defendant's failure to report the plaintiff's test results to the Oklahoma State Department of Health as probative of his intent in disclosing the plaintiff's condition to the press. The court would also note, that with respect to the loss of a privilege through abuse, comment a to § 603 states that "if the publication is made for the purpose of protecting the interest in question, the fact that the publication is inspired in part by resentment or indignation at the supposed misconduct of the person defamed does not constitute an abuse of the privilege." See generally W. Prosser and W. Keaton, The Law of Torts, § 115 at 834 (5th Ed. 1984) (although the following comment pertains to qualified privileges to defamation claims, the Restatement (Second) of Torts has made such privileges applicable to invasion of privacy claims). ("[I]t is the better and perhaps more generally accepted view that the mere existence of such ill will does not necessarily defeat the privilege. If the privilege is otherwise established by the occasion and a proper purpose, the addition of the fact that the defendant feels indignation and resentment toward the plaintiff and enjoys defaming him will not always forfeit it . . . [T]he court will look to the primary motive or purpose by which the defendant apparently is inspired."

§ 652G, the defendant's statements made in defense of his professional interest, are privileged.

Having found both that the plaintiff is an involuntary public figure and the defendant's statements pertaining to him were newsworthy, and that the defendant's comments were conditionally privileged, the court concludes that the defendant is entitled to summary judgment on the plaintiff's § 652D invasion of privacy claim.

Plaintiff's remaining claim is for breach of an "implied agreement of confidentiality". Defendant Calhoon contends that he did not commit a breach of confidentiality, because the plaintiff, by commencing this lawsuit, waived the physician-patient privilege under 76 Okl. Stat. § 19. That statute provides as follows:

> Access to medical records – Copies – Waiver of privilege.
>
> *In cases involving a claim for personal injury* or death *against any practitioner of the healing arts or a licensed hospital, arising out of patient care, where any person has placed his physical or mental condition in issue by the commencement of any action,* proceeding or suit *for damages,* or where any person has placed in issue the physical or mental condition of any other person or deceased person by or through whom such person rightfully claims, *he shall be deemed to waive any privilege granted by law concerning any communication made to a physician or health care provider with reference to any physical or mental condition or any knowledge obtained by such physician or health care provider by personal examination of any such*

> *patient;* provided that, before any such communication, medical or hospital record or testimony is admitted in evidence in any proceeding it must be material and relevant to an issue therein, according to existing rules of evidence. (emphasis added).

The court previously rejected the plaintiff's argument that any waiver resulting from his institution of litigation was limited by the statute to statements made in a hearing or a court sanctioned proceeding. At least one other court, construing a similar waiver provision, has reached the same conclusion, stating that "[t]he statute should not be interpreted so narrowly that it encompasses only situations involving formal court proceedings." *Moses v. McWilliams,* 549 A.2d 950, 955 (Pa. Super. Ct. 1988).

Plaintiff's contention that his position is supported by the confidentiality requirements imposed by 43A Okl. Stat. § 1-109 and 63 Okl. Stat. § 1-502.2 is similarly unpersuasive because those statutes are inapplicable. Section 1-109(A) of Title 43A is a provision of the Mental Health Law, 43A Okl. Stat. §§ 1-101, et seq., whose purpose is "to provide for the humane care and treatment of persons who are mentally ill or who require treatment for drug or alcohol abuse." Even if the Act pertained to this case, which it clearly does not, its confidentiality requirements are not effective when 76 Okl. Stat. § 19 is applicable: "Except as provided in this section and Section 19 of Title 76 of the Oklahoma Statutes, . . . " 43A Okl. Stat. § 1-109(A). A similar exemption from the confidentiality limitations imposed by the Oklahoma Public Health Code is found in 63 Okl. Stat. § 1-502.2(A): "[u]nless otherwise provided by law . . . " Section 19 of Title 76, Oklahoma

Statutes, provides "otherwise" and is controlling in this case.

Even if it is assumed that some waiver occurred, plaintiff basically argues that because there was no mention in the original complaint of the test for HTLV-III and because the alleged negligent acts did not concern the test, defendant Calhoon improperly disclosed to the public the test results. Plaintiff asserts that the waiver in § 19(B) was enacted to enable a physician to divulge confidential information he had about the physical or mental condition of his patient to prepare his defense and that any waiver of the physician-patient privilege is limited to the allegations in the complaint. While the court would concur that disclosure of confidential medical information that was *not relevant* to the medical malpractice suit might be actionable, the disclosures made by the defendant apparently pertained to his defense of the lawsuit.[6]

The court does not find that the statute limits the waiver to the extent that a physician should be precluded from revealing information relevant to his defense when questioned about malpractice claims asserted against him. The statute is broadly worded – "*any* privilege . . . concerning *any* communication . . . with reference to *any* physical or mental condition." Of significance to the

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[6] See notes 2 and 4, supra. Although the plaintiff has, by statements in his brief rather than by offering proof, challenged the defendant's motive in making the statements, he has only vaguely asserted that the remarks were not relevant or pertinent to the defense. Plaintiff's Supplemental Brief, pp. 4, 9-10.

court's decision is the fact that the reporter contacted the defendant. A different conclusion might have been reached if the defendant had, on his own, initiated the news conference. To restrict the waiver, as the plaintiff urges, under the facts of this case, might even impinge on the defendant's constitutional rights.[7]

Therefore, although the court does not intend by its decision to vindicate the defendant's statements or condone his behavior, it concludes that the plaintiff by filing his lawsuit, waived the physician-patient privilege to the extent of any communications material to the litigation (either the plaintiff's claims or the defendant's defenses), thus precluding him from recovering for breach of an implied agreement of confidentiality. See generally *Fedell v. Wierzbieniec*, 485 N.Y.S.2d 460 (N.Y. Sup. Ct. 1985) (no cause of action existed for breach of confidence based on doctor's revealing of communications between himself and patient/plaintiff to a defendant in a personal injury action without the plaintiff's consent, since the plaintiff waived the privilege by commencing a lawsuit that put his physical and mental condition in issue).[8] The defendant is entitled to judgment on this claim also.

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[7] Because of the court's decision, it is not necessary to reach the constitutional issue.

[8] Additional support for the court's decision is found in 12 Okl. Stat. § 1443.1, which provides that certain communications are privileged and thus not actionable as libel, including: "[a]ny and all expressions of opinion in regard [to a judicial proceeding], and criticisms thereon. . . If false statements are protected, true comments also should be shielded.

Finally, the court previously denied defendant Calhoon's motion as it related to the plaintiff's invasion of privacy claim premised on § 652B of the Restatement (Second) of Torts (intrusion upon seclusion.) Defendant Calhoon apparently seeks reconsideration of the ruling, as he has submitted an affidavit in which he attests that he did not order the laboratory studies that identified the plaintiff as a carrier of the AIDS virus. His position is that he cannot be found liable under § 652B because the tort requires an intentional intrusion, Restatement (Second) of Torts § 652B; *Werner v. Kliewer,* 710 P.2d 1250 (Kan. 1985), and he neither ordered nor performed the tests. The plaintiff responds by submitting evidence which he asserts refutes defendant Calhoon's affidavit: a record from the Oklahoma Teaching Hospitals Laboratories regarding the "T-Cell Subsets" and a hepatitis profile which the plaintiff contends reflects that the defendant was the requesting physician.

The fact that the defendant may have ordered a test for hepatitis does not establish that he ordered the AIDS blood tests. The court cannot tell from plaintiff's Exhibit "B" whether the "T-Cell Subsets" document reflects the results of an AIDS test or another test. The plaintiff is directed to submit this information within fifteen (15) days, together with any other evidence he has which establishes that the defendant ordered the AIDS tests.

The court does not concur with the plaintiff's apparent position, not supported by any authority, that the defendant's liability for invading the plaintiff's privacy may be predicated on the fact that the plaintiff was under the defendant's care and supervision, regardless of whether or not the defendant ordered the AIDS tests or

knew that they had been ordered and approved or ratified such. The court will await plaintiff's response to determine whether it should reconsider its decision that the plaintiff's § 652B invasion of privacy claim should be submitted to a jury.

Accordingly, a final decision on the pending summary judgment motions will be made upon the court's receipt and review of any evidence the parties submit.

IT IS SO ORDERED this 27th day of June, 1989.

/s/ Ralph G. Thompson
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

ROBERT WAYNE LEE, Plaintiff, vs. BAPTIST MEDICAL CENTER OF OKLAHOMA, INC., DR. SCOTT CALHOON; OKLAHOMA HEALTHCARE CORPORATION; and BAPTIST MEDICAL PLAZA ASSOCIATES, LTD., Defendants.	)	NO. CIV-88-354-T (Filed Jul. 24, 1989)

ORDER

Plaintiff Robert Wayne Lee has filed an application seeking an extension of time within which to submit additional evidence pursuant to the court's June 27, 1989 order and permission to conduct further discovery. The court concurs with the defendant's analysis of the plaintiff's application that it appears to be limited to the plaintiff's claim arising under § 652B of the Restatement (Second) of Torts. The court further agrees with the defendant that the only issue raised by the plaintiff's § 652B invasion of privacy claim is whether defendant Calhoon ordered that an AIDS test be performed on the plaintiff. Consequently, most of the statements made by the plaintiff in paragraphs 5 through 8 of his application are totally irrelevant.

The court reluctantly concludes that the plaintiff should be permitted, within the next thirty (30) days, to conduct additional discovery limited to the question of whether defendant Calhoon ordered the AIDS tests or knew that they had been ordered and approved or ratified such. Any additional evidence which the plaintiff wishes to submit must be filed within five (5) days after the conclusion of the thirty (30) day period. At that time plaintiff also should submit any information he possesses which is responsive to the court's directive on page 11 of the June 27, 1989 order.

Because the plaintiff has not submitted any evidence in support of his § 652D of the Restatement (Second) of Torts invasion of privacy claim or his breach of confidentiality claim, to refute the evidence submitted by the defendant, the court's decisions with respect to these two claims are now final. A decision on the only remaining claim, that for invasion of privacy under § 652B, will be made subsequent to the receipt of any additional evidence from the plaintiff.

IT IS SO ORDERED this 24th day of July, 1989.

/s/ Ralph G. Thompson
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

ROBERT WAYNE LEE, Plaintiff, vs. BAPTIST MEDICAL CENTER OF OKLAHOMA, INC., DR. SCOTT CALHOON; OKLAHOMA HEALTHCARE CORPORATION; and BAPTIST MEDICAL PLAZA ASSOCIATES, LTD., Defendant.	)	NO. CIV-88-354-T (Filed Dec. 12, 1989)

ORDER

Plaintiff Robert Wayne Lee instituted this action against Dr. Scott Calhoon seeking to recover for alleged medical negligence arising out of emergency surgery performed on the plaintiff. The plaintiff subsequently amended his complaint to add claims for defamation, invasion of privacy and breach of an implied agreement of confidentiality. Both parties filed motions for summary judgment and summary judgment was granted in favor of defendant Calhoon on the defamation claim, the plaintiff's invasion of privacy claim under § 652D of the Restatement (Second) of Torts and his claim for breach of an implied agreement of confidentiality. With respect to the plaintiff's invasion of privacy claim premised on § 652B of the Restatement (Second) of Torts (intrusion

upon seclusion), the plaintiff was directed to explain the significance of plaintiff's exhibit "B" and submit any other evidence to support his claim that defendant Calhoon ordered the AIDS test.

The plaintiff has filed his supplemental response and, in addition to failing to explain his exhibit "B", has failed to submit sufficient proof to controvert the evidence submitted by the defendant that he did not order or authorize either of the two AIDS tests. To the contrary, the only credible evidence establishes that the initial test was ordered by Dr. Crook and the subsequent test was automatically requested by Baptist Medical Center's blood bank due to the results of the HTLV-III test.

Accordingly, Dr. Scott Calhoon's motion for summary judgment on the plaintiff's § 652B claim is granted.

IT IS SO ORDERED this 12th day of December, 1989.

/s/ Ralph G. Thompson
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

ROBERT WAYNE LEE, Plaintiff, vs. BAPTIST MEDICAL CENTER OF OKLAHOMA, INC., DR. SCOTT CALHOON; OKLAHOMA HEALTHCARE CORPORATION; and BAPTIST MEDICAL PLAZA ASSOCIATES, LTD., Defendant.	)	NO. CIV-88-354-T (Filed Jul. 24, 1989)

JUDGMENT.

In accordance with the orders entered these dates, December 12, 1989, July 24, 1989 and June 27, 1989, judgment is entered in favor of the defendant Dr. Scott Calhoon and against the plaintiff Robert Wayne Lee.

IT IS SO ORDERED this 12th day of December, 1989.

/s/ Ralph G. Thompson
UNITED STATES
DISTRICT JUDGE

ENTERED IN JUDGMENT DOCKET ON 12-12-89

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ROBERT WAYNE LEE,
Plaintiff – Appellant,
v.
DR. SCOTT CALHOUN,
Defendant – Appellee,
and
SCOTT W. CALHOUN, M.D., INC.,
Defendant.

No. 90-6013

(Filed January 16, 1992)

ORDER

Before MCKAY, Chief Judge, HOLLOWAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA BALDOCK, BRORBY, EBEL, Circuit Judges, Brown, Senior District Judge.

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision sought to be reheard.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court
/s/ Robert L. Hoecker
ROBERT L. HOECKER, Clerk